

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
The NTC Group, Inc.) ASBCA Nos. 53720, 53721, 53722
Under Contract Nos. DAKF40-02-C-0001)
DAKF40-02-C-0002)
DAKF40-02-C-0003)

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OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

These are appeals from three final decisions terminating each of three contracts for cause. Only the propriety of the terminations is before us. A hearing was held in Fayetteville, NC and each party has filed an initial and a reply brief.

FINDINGS OF FACT

1. On 8 August 2001, the Installation Business Office Contracting Division at Fort Bragg, North Carolina, issued Solicitation No. DAKF40-01-B-0006 seeking bids for the operation of oil analysis laboratories at Fort Bragg, NC, Fort Drum, NY, and Hunter Army Airfield, GA. Bids were due at 1300 hours 24 August 2001. The solicitation contemplated the award of a separate contract for each of the locations and each contract was to be locally administered – the Fort Bragg Contract Administration Division for the Bragg contract, the Fort Drum Directorate of Contracting for the Drum contract, and the Fort Stewart Directorate of Contracting for the Hunter contract. Work was to commence on 1 December 2001. (R4(1), tab 1; R4(2), tab 1; R4(3), tab 1; tr. 34)¹

¹ Each docket has a separate Rule 4 file, but since the cases are consolidated, each is applicable to all dockets (tr. 6). The government also supplied a supplemental file that covered all three dockets. In this opinion, R4(1) refers to the file for ASBCA No. 53720; R4(2) refers to the file for ASBCA No. 53721; R4(3) refers to the file for ASBCA 53722; and R4(4) refers to the supplemental Rule 4 file. The supplemental file also includes tab 33 introduced by the government at trial. Tab 34

2. Prior to issuance of the solicitation, however, NTC Group, Inc. (NTC) had expressed an interest in bidding on that work and actually began the process of securing certified laboratory technicians in the event they ultimately received an award (R4(4), tab 25 at 1-15).

3. The original solicitation required the bidder to provide proof that it had certified laboratory technicians at the time of bid submission. Lara Deming (Deming), an administrator with NTC, objected to this requirement as restrictive and advised the procuring contracting officer, Virginia Salzman (Salzman)² that they might not be able to get assurances of employment at that time. Therefore, Salzman removed the requirement since the solicitation also included a requirement in the Performance Work Statement (PWS) that the identity of certified technicians be submitted to the government within 10 days of the start of performance.³ (Tr. 27-28; R4(4), tab 25 at 17-18). The bid opening date was therefore extended to 28 August 2001 (R4(4), tab 25 at 18).

4. At the date and time set for bid opening, Shawn Matty (Matty), who managed the Fort Bragg laboratory on behalf of its incumbent contractor (Southern Scientific), brought in a newly negotiated wage agreement for Fort Drum.⁴ Salzman therefore canceled the bid opening to incorporate the new Fort Drum wage agreement so that all bidders would have the same information and advised the bidders that a new bid opening date would be announced. (Tr. 36-37) While Salzman would have liked to have received the new wage information sooner, she testified that she had no choice but to accept it (tr. 38).

is TM 38-301, volume 1, and tab 35 is Technical Bulletin (TB) 43-0211 both of which were referenced in the contract but not included. The government supplied both of them after briefing at the Board's request. Tab 36 is volume 2 of TM 38-301 (including Appendix N) also incorporated by reference into the contract, and is available on the website: <http://www-ext.tinker.af.mil/tild/to/33-1-37-2wchgl.pdf>. Documents introduced at trial by appellant are referred to as ex. A-1, etc.

² While Salzman had married and changed her surname to Mitchell at the time of her testimony (tr. 25), she was known as Salzman at all times relevant to these appeals and that is how we refer to her in this opinion.

³ The actual provisions in the contracts are somewhat different. See findings 20-22, *infra*.

⁴ The incumbent contractor at Fort Drum was also Southern Scientific (tr. 101).

5. The revised bid opening date was 4 October 2001. Six bids were received. Matty delivered the bids for Southern Scientific and for Analytical Testing Limited,⁵ neither of which was low bidder for any location. (R4(4), tab 32; tr. 36) NTC was low on two locations (Fort Drum and Hunter Army Airfield) and another bidder, Giles Air, LLC, was low bidder on the third location (Fort Bragg) (tr. 30; R4(4), tab 32).

6. Giles Air had bid all or none so it declined award of the Fort Bragg contract. On 7 November 2001, Salzman called Deming and asked if NTC, as next low bidder, would accept that contract as well. NTC indicated it would accept that contract. (Tr. 30; R4(4), tab 25 at 28)

7. We discern from Deming's numerous e-mails in the record that, after bid opening, NTC continued trying to hire certified laboratory technicians from other federal locations, including Fort Lewis, but ultimately was unsuccessful (R4(4), tab 25). In any event, on 10 November 2001, James Cohill (Cohill), of NTC, sent an e-mail to various federal installations including Yuma Proving Ground, Fort Lewis, LOGSA, Fort Stewart, Fort Shafter, Fort Rucker, Fort Riley, Fort Richardson, Fort Polk, Fort Knox, Fort Irwin, Fort Hood, Fort Drum, Fort Campbell, Fort Bragg, and to several other locations. To this e-mail was attached a job announcement for AOAP (Army Oil Analysis Program) Technicians/Evaluators, Technician/Trainee Evaluators, laboratory assistants, clerks and drivers for locations in Georgia, North Carolina and New York State. (R4(3), tab 2)

8. The Fort Lewis AOAP lab chief forwarded the job announcement to Matty and noted the e-mail address indicated "it was sent from Mr. Cohill." Matty in turn forwarded the job announcement to the lab chiefs at Drum and Hunter noting: "This is the kind of stuff they are doing behind our backs. This was received at Fort Lewis. Stick together." (R4(3), tab 2)

9. On 13 November 2001, Rhonda Jones (Jones), lab chief at Hunter, forwarded the e-mailed job announcement to Merle Hughes (Hughes) who brought it to attention of Debe Austin (Austin) and Willie Barnett (Barnett), who all worked for the directorate of contracting at Fort Stewart, on that same date. Jones included the following message in her transmittal:

Being that I am still employed by Consultants, LTD and this was received via Government e-mail, I thought you might like to take a look. It just doesn't seem right to me that this kind of solicitation can go out to Government e-mail

⁵ In addition to serving as a manager for Southern Scientific, Matty was also an owner of Analytical Testing Limited (Bowen Deposition, 36-37).

addresses by a private company. Another question would be how did they obtain these addresses?

I'm questioning the integrity of this company, wondering, if this is a legal way to obtain new employment? Wouldn't you think they would offer the current employees the chance to work for them?

(R4(3), tab 3)

10. On 14 November 2001 Matty e-mailed Salzman, with copies to Bragg ACO Lynn Cherry (Cherry), and COR George Graves (Graves) as follows:

I know that we have not heard anything official on the award of our contract form [sic] the Government. I also know that we have been contacted by several labs and other entities that have forwarded e-mail of offers that NTC group has been awarded all three laboratories. Since we are being considered [for] all three at the same time I have been in constant contact with the other laboratory chiefs about this situation. There have been reports from other laboratory personnel on the ethic of recruitment techniques. Sending commercial emails to government addresses, soliciting personnel of current employees of other companies [sic]. The person involved in the project management of NTC group (sister company of big business company SKE in Germany) has a long history in the oil analysis business. This "reputation" based on personal experiences and from all laboratory chiefs involved and persons throughout the oil program have concluded that this is not a company that we do not [sic] want to work for nor will even consider employment with. This e-mail is to inform you that if any employee on any level from any of these three laboratories is submitted to your office as employees or potential employees this is false documentation and should be looked at and dealt with appropriately. Quality and readiness has always been our goal here and not how much we can suck from the government, and if the contract is awarded based on this; [sic] NTC group would have clearly not been the choice. I just wanted you to know how the people who are most affected and being the most left in the dark fell [sic] at this moment.

(R4(1), tab 4 at 2) This e-mail was somewhat disingenuous since Matty had delivered the bids for two companies and the bids were read aloud (tr. 29, 36). Both bids were probably non-responsive for failure to acknowledge solicitation amendments, but since none of the bids were in line for award, the contracting officer took no action (tr. 39).

11. On 15 November 2001, Cherry received a telephone call from Matty and she recorded the gist of that conversation as follows:

I received a call from Shawn Matty saying that he understood the new oil analysis contract had been awarded. I told him I did not know anything about it, that as far as I knew, no award had been made yet. I also told him that we only know about the award once the contract is signed and transferred to this office for administration. Mr. Matty stated that the Contractor was a company called NTC Group, that they were an 8(a) company, that a Mr. James Cohill would be the project manager. Mr. Matty stated that he and his employees knew all about this company and they weren't to be trusted. He said that they would hire the incumbent employees just long enough to get minorities trained and then let the incumbents go. He said then the company would work to get the contract to be an 8(a) set aside so no one else could bid on it. I told Mr. Matty that I had not heard anything but good about the low bidder and that I did not know where he was getting his information but that he should give the company a chance before making snap judgments. Mr. Matty said that he and his employees had dealings with Mr. Cohill in the past and did not want anything to do with him and that he felt none of his people would want to work for the NTC Group.

Based on this information, I called the Procuring Contracting Officer [Salzman] and gave her this information so she would know what was going on.

(R4(1), tab 3)

12. Jones, lab chief at Hunter, received a copy of Matty's e-mail and answered him on 15 November 2001 with a copy to Salzman, Cherry, Turner and Graves as follows:

Thank you for cc of this memo. I'd like to add a comment for the record on this matter. We (all lab personnel) agree totally with your observations and have also decided that NTC will

not be employment of choice by Hunter AAF/FT. Stewart Oil analysis personnel. We feel employment with this company would not be a benefit to the AOAP program.

(R4(1), tab 4)

13. On 15 November Cherry separately called Deming and Salzman and told them the specifics of her conversation with Matty, relating essentially the same information as was included in her memorandum for the record. To Deming she additionally stated:

I told [her] that I wanted her to know this information ahead of time so that if the current contract employees decided not to work for NTC, the[y] would be able to find other employees. I recommended that if NTC did indeed want to hire the current employees, that NTC contact each employee away from their office as they could not interfere with current contract operations. I told her that I would have a seniority list of employees for NTC when they came to the pre-work contract.

Cherry told Salzman she anticipated problems with the incumbent employees. Cherry recorded Salzman's reaction, as follows:

She [Salzman] said she would discuss this with her supervisor and then decide what if anything she should do. She said that maybe the government should change the contract start date to 1 January 2002 to allow NTC time to find employees in the event Southern Scientific's employees decided not to work for NTC. I told Virginia that I just couldn't understand why the employees were acting like they were as it appeared that they all needed jobs and that they had set up a good program. It seems self-destructive for Mr. Matty to refuse to work for them if he is so concerned for the mission of the Oil Lab.

(R4(1), tab 5) Cherry realized that Matty was using government resources for his own purposes, so she directed him to cease using the government's e-mail and telephones for his personal gain and to "get the employees stirred up" (tr. 47, 71).

14. On 20 November 2001, a meeting was held between contracting personnel and NTC for purposes of signing the three contracts. In addition to Salzman, Karen Rainville, another contracting officer and Joe Zima, legal advisor, represented the government. Representing NTC were Sherman Maddux (Maddux), CEO, Christene

Jones, president, and James Cohill, program manager. Maddux signed all three contracts and the start date for each was set for 1 January 2002. (R4(1), tab 6)

15. Thus, on 20 November 2001, Contract No. DAKF40-02-C-0001 (Fort Bragg contract) was awarded to NTC for performance at Fort Bragg, NC (R4(1), tab 1), Contract No. DAKF40-02-C-0002 (Fort Drum contract) was awarded to NTC for performance at Fort Drum, NY (R4(2), tab 1) and Contract No. DAKF-02-C-0003. (Hunter contract) was awarded to NTC for performance at Hunter Army Airfield, GA (R4(3), tab 1). Each contract was to be separately administered at each location (R4 (1), (2), (3), tab 1).

16. Each contract required each AOAP laboratory to “provide personnel in adequate numbers having qualifications, training, certifications, and licenses which permit them to perform all requirements contained in this contract.” All labs were required to provide a minimum of two (2) Class A Logistic Support Activity (LOGSA) certified Technician/Evaluators trained in ferrographic procedures and methodology in accordance with TM 38-301. At Fort Bragg the certified technicians were additionally required to be trained in fourier transform infrared (FTIR) spectroscopy procedures and spectrometric oil analysis procedures. (R4(1), tab 1 at TE 1A-1; R4(2), tab 1 at TE 2A-1; R4(3), tab 1 at TE 3A-1) LOGSA is a component of the U.S. Army Materiel Command, Defense Logistics Agency, Huntsville, Alabama (R4(1), tab 1 at 7 of 32).

17. The contractor was required to comply with Technical Manual 38-301-1 through 4 (*id.*, tab 1 at 20 of 32). Paragraph 4-7 of Volume 1 of that manual sets forth the qualifications for operators and evaluators for each branch of the service. For the Army, Laboratory operators and evaluators were to meet all of the requirements of Volume 2, Appendix N (R4(4), tab 36). Appendix N, entitled Army Requirements for Certification of Laboratory Personnel provided that:

To be certified, an individual must be actively employed in an Army Oil Analysis Program (AOAP) laboratory on a full time basis.

(*Id.* at N-1)

18. Other specifics as to training, skills and experience are also listed. Decertification occurs if an evaluator is employed full-time in an AOAP laboratory for less than 8 consecutive months within a calendar year or if an evaluator is not employed full-time in an AOAP laboratory for 4 consecutive months. For those previously certified the manual requires that they be actively employed in an AOAP laboratory on a full-time basis. (*Id.* at N-1 to 3)

19. Based upon the foregoing we find that the certification requirements were fashioned in such a way that in order to have two certified evaluators for each location, NTC had to either hire the incumbents or lure certified evaluators from other AOAP laboratories.⁶

20. Prior to performance, the PWS of the Fort Bragg contract required the designation of a project manager with authority to make decisions on behalf of the contractor and an alternate, one of whom had to be onsite whenever the laboratory was in operation. The contractor was also required to designate a Laboratory Supervisor/Evaluator and an alternate to manage the laboratory. Either the supervisor or the alternate had to be onsite whenever the laboratory was in operation. It was expressly provided that the Laboratory Supervisor/Evaluator could also be the Project Manager. Other positions and minimum qualifications for those positions were listed, including assistant laboratory technician, AOAP Monitor/Instructor, Computer programmer, and AOAP courier. Paragraph C.1.2.15, IDENTIFICATION OF CONTRACTOR'S EMPLOYEES, in Technical Exhibit 1A of the Fort Bragg contract, provided as follows:

The Contractor shall, within ten (10) calendar days after determination of responsive low bidder, submit a list of all employees who will perform under this contract to the Contracting Officer. The list shall include the full name, current address, and work classification of each employee. In addition, the list shall contain the names of the Logistic Support Activity (LOGSA) certified evaluators to be employed under this contract, to include a copy of their current certification, and a letter of intent to perform under this contract. The Contractor shall notify the Contracting Officer in writing of any addition, deletion, or change in work assignment within two days of such change.

(R4(1), tab 1 at TE1A-1 through 7)

21. The PWS of the Fort Drum contract also required the contractor to designate a project manager and an alternate prior to performance, authorized to make decisions on behalf of the contractor, one of whom had to be onsite whenever the laboratory was in operation. NTC also was required to designate a Laboratory Supervisor/Evaluator and an alternate to manage the Fort Drum laboratory, one of whom had to be onsite whenever the laboratory was in operation. The Fort Drum contract similarly allowed the Supervisor

⁶ There are 24 AOAP laboratories worldwide (R4(4), tab 35 at 10-1 to 10-4) and all Army laboratories were required by TM 38-301-2 to employ two certified evaluators full time (R4(4), tab 36 at 2-1).

to also function as Project Manager. The only other position described in the contract was for Physical Science Aides and minimum qualifications therefore were listed. (R4(2), tab 1 at TE 2A-1 through 3) Paragraph 1.2.10, IDENTIFICATION OF CONTRACTOR'S EMPLOYEES in Technical Exhibit 2A of the Fort Drum contract, provided as follows:

The Contractor shall, within ten (10) calendar days after determination of award, submit a list of all employees who will perform under this contract to the Contracting Officer and Contracting Officer's Representative (COR). The list shall include the full name, current address, and work classification of each employee plus emergency telephone numbers where key personnel may be contacted when not present at the work site. In addition, the list shall contain the names of the Logistic Support Activity (LOGSA) certified evaluators to be employed under this contract. The Contractor shall notify the Contracting Officer and COR in writing of any addition, deletion, or change in work assignment within two days of such change.

(R4(2), tab 1 at TE 2A-5)

22. The PWS for the Hunter Army Airfield contract similarly required that, prior to performance, NTC was to designate a Project Manager and an alternate with authority to make decisions on behalf of the contractor, one of whom was required to be onsite at Hunter whenever the laboratory was in operation. NTC also had to designate a laboratory supervisor/evaluator and an alternate to manage the laboratory, one of whom had to be onsite whenever the laboratory was in operation and present during all testing operations. This Laboratory Supervisor/evaluator could also be project manager. No other positions were prescribed by the contract. (R4(3), tab 1 at TE 3A-1) Paragraph 1.2.7, IDENTIFICATION OF CONTRACTOR'S EMPLOYEES, of the Hunter PWS provided as follows:

The Contractor shall, within ten (10) calendar days after determination of responsive low bidder, submit a list of all employees who will perform under this contract to [the] Contracting Officer. The list shall include the full name, current address, and work classification of each employee. In addition, the list shall contain the names of the Logistic Support Activity (LOGSA) certified evaluators to be employed under this contract, to include a copy of their current certification, and a letter of intent to perform under this contract. The Contractor shall notify the Contracting

Officer in writing of any addition, deletion, or change in work assignment within two days of such change.

(*Id.* at TE 3A-4)

23. Section C.5.1.1.2 of the Fort Bragg, Fort Drum, and Hunter Army Airfield contracts, states that “[r]outine aeronautical samples shall be processed within 24 clock hours of receipt and routine non-aeronautical samples within 72 clock hours of receipt, weekends and holidays excluded.” (R4(1), tab 1 at 12 of 32; R4(2), tab 1 at 12 of 32; R4(3), tab 1 at 12 of 31).

24. The Fort Bragg, Fort Drum, and Hunter Army Airfield contracts all contained FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (MAY 1999), which states in pertinent part:

(f) *Excusable delays.* The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement or any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

. . . .

(1) *Termination for the Government’s convenience.* The Government reserves the right to terminate this contract, or any part thereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination The Contractor shall not be paid for any

work performed or costs incurred which reasonably could have been avoided.

(m) *Termination for cause.* The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(R4(1), tab 1 at 23-24 of 32, R4(2), tab 1 at 23-24 of 32, R4(3), tab 1 at 22-24 of 31)

25. A pre-work conference for the Fort Bragg contract was held on 27 November 2001. The contractor was advised that Cherry was the ACO, Emmie Turner (Turner) was the contract administrator and Graves the COR. NTC was reminded of the requirement to designate a contract manager and an alternate prior to contract performance and the requirement to provide two LOGSA certified evaluators, an AOAP Monitor Instructor, computer programmer, AOAP Courier and laboratory technicians. Cohill, who attended for NTC, stated that he could not understand why the incumbent employees had not contacted him since he e-mailed them. Cherry told Cohill that he was not to e-mail employees at work but had to contact them after hours. Maddux explained that NTC intended to hire the current employees and wanted to talk to them. Cherry told him he could not do so until after work hours. She offered, and Maddux accepted, to contact the incumbents to see if they would meet with Maddux after hours and that meeting was arranged for 5:00 pm the same day. (R4(1), tab 7)

26. After award of the contracts, Cohill contacted the LOGSA program office in Huntsville, Alabama to request a copy of all current certified evaluators so that NTC could contact them. That information was denied to him as constituting personal information protected under the Privacy Act (tr. 133-34).

27. On 10 December 2001, Turner called Maddux and reminded him that NTC should have submitted a list of employees to be used on the contract by 30 November per paragraph C.1.2.15 of the Fort Bragg contract and that he needed to send in the quality control plan and the evidence of insurance. Maddux reported that he was aware of the

requirement for the list of employees, but that he was experiencing difficulty with an employee of the Bragg lab. (R4(1), tab 8)

28. Turner called Matty the next day to verify the status of employment of incumbents with NTC and Matty advised that no agreement had been made since NTC made an unacceptable offer for all employees (*id.*, tab 9).

29. On 12 December Maddux furnished the insurance certificate to Cherry, reminded her that the quality control plan had been delivered at the pre-work conference and stated that the property management plan would be submitted no later than 27 December 2001. With respect to personnel, Maddux stated that on 27 November 2001, Maddux and Cohill met with the Fort Bragg employees and answered their questions with regard to employee benefits. Following an open discussion, Maddux and Cohill had one-on-one sessions with the employees and left with the impression that all employees were considering employment. (R4(1), tab 10, R4(4), tab 29 at 7) Further, Maddux advised Cherry that on 7 December 2001, NTC sent each incumbent employee an offer letter stating a fair and reasonable wage and terms of employment. Those who were sent letters, according to Maddux, were Matty, Michael Lambeth, Brenda Mcquitty, Fred Puuatua, Luz Rivera, Woodrow Bowden, and Kenya Vacquez. (R4(1), tab 10)

30. On 7 December 2001, Matty, as Lab Chief/Project Manager for Bragg, Jones as Lab Chief/Project Manager for Hunter and Matthew A. Monroe (Monroe), as Lab Chief/Project Manager at Drum, each wrote essentially the same letter to NTC. Each letter acknowledged a previous meeting with Maddux and Cohill and stated that during the meeting, they discussed the opportunities for NTC to employ incumbent personnel at the respective locations, and that the outcome of each meeting and NTC's plans for the respective laboratory concerned the employees of each laboratory. Continuing, each letter identically stated:

Thus, we are especially concerned for our employment agreements. To protect us from any future re-arrangements of your company's policies, which would enforce the termination of any incumbent employee, this contract of terms and conditions was drafted for protection against any such matters. In order for any incumbent employee to accept employment with the NTC Group, ALL items said herein MUST be agreed upon and never modified nor changed. Please understand that most of the employees have been through this and understand that it's not uncommon practice for a company to promise wages, benefits, and employment to qualify for and be awarded a contract to only change

company policies resulting in said employees to be unemployed or demoted.

Enclosed is the contract of Terms and Conditions for Employment. Upon a signed and complete agreement to this said contract and to individual proposals, as discussed per our meetings, completed and signed applications will be provided to you.

If you or anyone from your company does not respond by 3:00 pm Dec 07, 2001, we will assume that your company has refused to employ us.

(R4(1) tab 13 at 5, R4(2), tab 9, R4(3), tab 6)

31. Attached to the letter were twelve terms and conditions that were extraordinarily onerous, and would in essence make each incumbent lab chief more powerful than the owners of NTC with respect to the operation of each lab. Some examples of the twelve were: Cohill could have nothing to do with the contract, company policy concerning incumbents could originate only with the lab chief, NTC would have no authority to take personnel actions against incumbents unless approved by the lab chief, no firing or reprimands of incumbents except with approval of lab chief, and technology existing or developed during "occupation of NTC" would be the sole property of the lab chief. The terms and conditions were obviously written in such an onerous manner to discourage an agreement with NTC. Nevertheless, NTC agreed to these terms (R4(1), tab 13).

32. Thus, the lab chiefs had to devise an excuse for not accepting employment with NTC, and the result was a letter signed by all three of the lab chiefs. In that letter, which was undated but faxed on 19 December 2001, they said Maddux's signatures on several documents were different and gave them some concern as did the NTC plan of action for operating the labs. They asked Maddux to explain what some unnamed terms and conditions in the contracts meant to him and to explain the role that Cohill would play in relation to the program. Equivocally they stated:

This letter neither reflects the desire to work for your company nor the desire not too [sic]. It merely is a request for your company's vision of our future.

(*Id.*)

33. Apparently because he acquiesced in the onerous conditions the lab chiefs insisted upon, Maddux assumed he had a deal to employ the incumbents, including the

LOGSA certified technicians at Bragg and Drum, because on 14 December 2001, he advised Cherry that six named incumbents had accepted employment at Bragg, including Matty (R4(1), tab 11) and he advised Christine Jeffries, CO at Drum, that four incumbents, including Monroe, had accepted employment at Fort Drum (R4(2), tab 7).

34. On 12 December Maddux advised Austin at Fort Stewart that he had sent letters offering employment to seven named incumbents at Hunter, including Jones, but had received no response (R4(3), tab 9). Jones made it clear to Austin on 19 December 2001 that she had no intentions of talking to or working for NTC (R4(3), tab 13).

35. On 26 December 2001 Maddux informed Austin as follows:

Shawn Matty represents all of the employees at labs at Fort Drum, Fort Bragg and Stewart/Hunter and he has instructed all employees not to talk to NTC. It has been stated that Mr. Matty has informed all lab employees that they will be unemployed no longer than three days before award will be made to one of the three firms he represents. Employees are being threatened, being held under duress

(R4(3), tab 16)

36. Based upon our review of the record we conclude that Matty, together with the two other lab chiefs, purported to represent all of the incumbent employees of the labs and conspired to thwart the performance of NTC. While contracting personnel at all locations were aware of these efforts, we have no credible evidence that any government personnel participated in or encouraged that conspiracy.

Termination of Fort Bragg Contract

37. On 28 December 2001, Maddux assured Cherry that NTC was prepared to begin work on 1 January 2002. That same date, Turner requested that Maddux fax the list of employees and certifications of evaluators required by the contract. (R4(1), tab 18) As of 3:00 pm on 28 December, the certifications and the list had not been received (*id.*, tab 19).

38. On 31 December 2001 at 9:20 am, Patrick Nixon, Chief of Contract Administration at Fort Bragg called Maddux about whether NTC was prepared to start on 1 January 2002. While Maddux said he was still working on getting the contract started, Nixon told him the government needed something firm in the next two hours or he would be forced to terminate and extend the present contract by one month. (R4(1), tab 20)

39. A few hours later, at about 12:20 pm, Cherry e-mailed Maddux informing him that the Fort Bragg contract was terminated for cause effective that day and such termination was communicated by fax. The termination letter stated that under paragraph 1.2.15 of Technical Exhibit 1A, NTC failed to provide a letter of intent from the LOGSA certified evaluators which was due 10 calendar days after determination of responsive low bidder and failed to give adequate assurance of future performance when asked to do so earlier that day by Mr. Nixon. (*Id.*, tab 21)

40. Maddux took issue with the termination (*id.*, tabs 22-23) and on 12 March 2002 filed a notice of appeal to the Board, which was docketed as ASBCA No. 53720.

Fort Drum Termination

41. On 20 November Maddux requested the help of Roberta Meyers (Meyers), contract administrator at Fort Drum, in making employment information available to the incumbents at Fort Drum (R4(2), tab 2). Maddux and Cohill attended a post award orientation on 30 November 2001 where Meyers, Loren Martin (Martin), and Neil Walroth (Walroth) represented Fort Drum Directorate of Contracting. NTC was reminded to submit a list of employees, which was said to be due 10 days prior to contract performance. (*Id.*, tab 4)⁷

42. On 4 December, Maddux asked Martin for the names, phone numbers, addresses and current positions of the Fort Drum incumbents and on 6 December Martin said neither she nor Meyers had that information, but she passed the request on to the lab chief (*id.*, tab 5).

43. On 14 December 2001, Maddux advised the Drum contracting officer that four named incumbents had accepted employment and based upon that letter, Meyers on 19 December 2001, felt there was no problem with staffing at the Drum laboratory. She decided that the lab did not have to be staffed until 2 January since the first of the month was a holiday. Later that day, however, Regina Miller, a branch chief in the Directorate of Contracting, advised Meyers that there might be a problem in that, except for one data transcriber, the incumbents did not intend to work for NTC (*id.*, tabs 7, 8).

44. On 2 January 2002, Christine Jeffries received a phone call from Deming who was on her way to Fort Drum to pick up the keys to the lab. Jeffries then talked to Martin, AOAP COR, who told her that the previous contractor employees were onsite under the belief that there had been an extension of the previous contract. Jeffries advised Martin that there had been no extension and that if the employees had not accepted employment with NTC, they should not be working, and should turn in their

⁷ Actually it was due 10 days after determination of award (see finding 21).

keys and identification cards. When the incumbents were asked if they would be willing to talk to the NTC representative they initially agreed, but 15 minutes later changed their minds, turned in their keys and identifications and departed the lab. (*Id.*, tab 10)

45. At about 1 pm on 2 January 2002 Jeffries inquired as to when NTC would have certified evaluators to begin evaluating samples at Fort Drum and Maddux said he was working on a resolution (*id.*, tab 12). At about 5 pm that same day, contracting officer Jeffries faxed a cure notice to NTC giving notice that the government considered its failure to provide two certified technician/evaluators as required by the contract to be a condition endangering performance. Further, Jeffries advised that aeronautical samples received on 2 January 2002 are required to be processed within 24 clock hours of receipt making them due 3 January, and unless that was accomplished the Government might terminate the contract for cause. The same notice was faxed again on the morning of 3 January and again on the morning of 4 January 2002. A copy was hand delivered to Deming on 3 January 2002 when she was onsite conducting inventory. (*Id.*, tab 14)

46. On 4 January Maddux advised Jeffries that NTC had a contingency plan to cure the problem, which involved shipping the samples to Fort Hood and Fort Polk for analysis (*id.*, tab 19).

47. Maddux submitted a proposed team for Fort Drum on 7 January 2002, which included Cohill as the only certified evaluator (*id.*, tab 20). Daniel McElroy, Fort Drum's AOAP Program Manager, advised that same date that Cohill's certificate lapsed as of 31 December 2000, the date he retired from federal service and, citing Appendix N of TM 38-301-2, advised that decertification automatically occurs if an evaluator is not employed full time for 4 consecutive months in a calendar year (*id.*, tab 21).

48. Consequently, effective the same date, 7 January 2002, the contracting officer terminated the Fort Drum contract for cause for (1) failing to process and evaluate aeronautical samples within the time frames required by the contract; (2) failing to comply with Technical Exhibit 2A, Section 1.2, entitled Personnel which requires firm to provide qualified personnel in adequate numbers and stating the Certificate for Cohill submitted that day had elapsed as of 31 December 2000. On 12 March 2002, NTC filed a notice of appeal of the contracting officer's decision and the appeal was docketed as ASBCA No. 53721.

Termination of Hunter Army Airfield Contract

49. A pre-performance conference was held on 4 December 2001 at Hunter. Maddux and Cohill represented NTC. Austin, contracting officer, Gary Templin (Templin) and Hughes, contract specialists, and Luis Carreras, COR for the AOAP contract, represented the Government. (R4(3), tab 7)

50. As set forth earlier in this opinion, NTC attempted to hire the incumbents at Hunter but were thwarted in their efforts. The owner of Consultants, Ltd. provided the seniority list at Hunter on 21 December 2001 to the government and it was faxed to NTC on 26 December 2001 (*id.*, tab 15).

51. On 3 January 2002, Maddux submitted a contingency plan to the contracting officer for approval which called for shipment of oil samples to Fort Hood for analysis (*id.*, tab 19). On that same date Templin called the Hunter laboratory at 8 and 9 am and got no answer. At 10 am, an NTC employee answered the phone and advised that a certified technician was en route from Fort Bragg to work on a temporary basis and would arrive on 4 January 2002. (*Id.*, tab 20)

52. On 4 January 2002, the contracting officer terminated the contract for cause for failure to comply with the requirement to provide personnel in adequate numbers with proper qualifications. The government considered the failure to provide qualified personnel to be a condition “that has halted the performance of the above-mentioned laboratory” and is thus sufficient cause for termination. (*Id.*, tab 22)

53. On 12 March 2002, NTC appealed the final decision to the Board and the appeal was docketed as ASBCA No. 53722.

DECISION

Preliminary Matter

In its brief, the government renewed its objection to the testimony of Mr. James Reynolds as an expert witness “because he was stating legal conclusions that were more properly within the purview of the Board” (gov’t br. at 84-85). We sustain the objection. We do not rely on Mr. Reynolds’ testimony in this decision.

Merits

The Termination for cause provision in each contract allowed the government to terminate the contract in the event of any default by the contractor, a failure to comply with any contract terms and conditions, or a failure upon request to provide adequate assurance of future performance. The Fort Bragg contract was terminated for failure to provide a letter of intent from LOGSA certified evaluators in a timely manner and for failure, after a request, to give adequate assurance of future performance. These were valid reasons for termination. The Fort Drum contract was terminated for failure to timely process aeronautical samples and failure to provide qualified personnel in adequate numbers. In fact, no aeronautical samples were processed and no personnel were provided and thus this was also a valid basis for termination. At Hunter, the contract was terminated for failure to provide personnel in adequate numbers and with

proper qualifications. Since no qualified personnel were provided, this also was a valid basis for termination.

Each of the terminations must stand unless NTC establishes that its performance was excusably delayed because of reasons beyond its reasonable control “and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers” (finding 24).

Generally a contractor is responsible for providing the necessary labor for performance of a contract awarded to it, and a failure to do so is not good cause for excusing performance. *Electric Machinery Mfg., Co.*, ASBCA No. 13010, 69-1 BCA ¶ 7701 at 35,714. Thus, a contractor’s unrealized expectation that it could hire the incumbent employees was not a valid basis for excusing performance where there was no evidence that government personnel responsible for awarding and administering the contract had contributed to that condition and appellant had not proved that its inability to hire the employees either contributed to the default or was beyond its control and without its fault or negligence. *New England Tank Industries, Inc.*, ASBCA No. 6670, 61-2 BCA ¶ 3233 at 16,761.

In its initial brief, appellant focuses on the actions of Matty and argues that his attempts to sabotage NTC’s performance under the contracts constituted excusable delay citing the following circumstances:

In the instant case, Matty created an actual or apparent “conflict of interest” with his tactics during the pre-award phase but received no reprimand or admonishment from the Government. The conflict was exacerbated by Matty’s use of the Government’s computers and email system to deter other AOAP lab workers from agreeing to work for Appellant, and other attempts to sabotage Appellant’s performance under the contracts. The Government, through the Fort Bragg contracting officers, breached its responsibility under the FAR by failing to eliminate that conflict of interest and bar Matty from interfering with Appellant’s performance, and thus ensure that Appellant received “impartial, fair, and equitable treatment.”

(App. br. at 6)

The evidence shows that the Government knew of the actions of Matty and the other lab chiefs to prevent performance by NTC. While the government made an effort

to persuade the incumbents to work for the new contractor, the government had no control over those individuals. When they found Matty using the government's e-mail system to further his scheme, they forbade him from doing that. We can find no fault with the government with respect to how its agents interacted with the incumbents such as would render the defaults excusable.

In its reply brief appellant argues that the refusal of LOGSA, a government entity, to release the names of certified evaluators when appellant was required to hire two certified evaluators, was a cause of its failure to hire certified evaluators, and renders the defaults excusable. NTC states: "The Government can't demand that a contractor hire certain employees, whose certification the Government controls, and then refuse to identify those individuals for the contractor." (App. reply at 2)

Although "strikes" is the only labor related event enumerated in the Termination for cause provision in the contracts, on rare occasions we have excused a default for a labor related cause that was not a strike.⁸ For example in *Bannercraft Clothing Co., Inc.*, ASBCA Nos. 6247, 6685, 1963 BCA ¶ 3995 at 19,736, we excused delay and the ensuing termination for default of certain orders due to the siphoning off of the contractor's highly skilled operators by competitors which delay was "sorely aggravated by the improper removal of the Government inspector from the contractor's" plant. *See also Fred A. Arnold, Inc.*, ASBCA No. 16506, 72-2 BCA ¶ 9608 (time extension granted to contractor where employees refused to cross picket line against another contractor working at same shipyard even though it was not technically a strike because it was an unforeseen development that the striking union would ignore the "one gate plan" and both gates would be picketed).

In *Oxnard Van & Storage, Inc.*, ASBCA No. 8467, 65-1 BCA ¶ 4551 at 21,802, the contractor argued "that it was the victim of a conspiracy to keep it from getting [the] contract, and after award to bring about a default termination." Although the Board in *Oxnard* upheld the termination for default, and did not deem it necessary to decide the conspiracy issue in order to decide the appeal, it stated:

Assuming all of Oxnard's evidence related to matters causing delay is believed, it does not appear from this file that all necessary or available steps were taken to overcome the interference placed in Oxnard's path by Navy personnel.

In another case where we denied an appeal from a default termination, we discussed the circumstances under which labor problems might form a basis for excusability, as follows:

⁸ Indeed, the Termination for cause provision does not limit excusable causes to strike.

Neither a general labor shortage, the unavailability of skilled operatives or technical specialists, nor the loss of employees on whose assistance a contractor may have counted, will provide a basis for a time extension unless that labor shortage was due to abnormal circumstances that could not have been anticipated. *Robert McMullen & Son, Inc.*, ASBCA No. 11988, 68-1 BCA ¶ 7068; *Seaview Electric Co.*, ASBCA No. 7189, 1962 BCA ¶ 3331; *James A Connor, as Trustee* [ASBCA No. 10356, *et al.*, 68-2 BCA ¶ 7409].

Hydro Fitting Manufacturing Corp., ASBCA Nos. 11768, 13077, 70-1 BCA ¶ 8211 at 38,183.

The crux of the foregoing case law is that we will not allow excusable delay from a labor problem other than a strike except in the most unusual circumstance as where the Government also contributed to the delay (*Bannercraft*), or where abnormal circumstances exist which could not have been anticipated (*Hydro Fitting*).

In our view, such a circumstance exists in these appeals with respect to the juxtaposition of an unanticipated and unforeseen conspiracy by the incumbent chiefs and the unusual LOGSA requirements. The nature of the requirement for LOGSA certified evaluators and the method by which one obtains and retains certification created an extraordinarily limited pool of candidates, which was exacerbated by the refusal of LOGSA to share the names of persons then-currently certified. Appellant was left to randomly contacting existing laboratories for candidates or hiring the incumbent employees. The former proved unsuccessful and the latter was stymied by the unusual conspiracy between the incumbent chiefs at the three laboratories. When appellant agreed to hire the incumbents under the onerous conditions proposed and was still unsuccessful, it had done all it could reasonably do to acquire the necessary employees and perform the work required by the contracts.

While one might conclude that NTC should have foreseen the difficulty in finding LOGSA certified evaluators, that difficulty was “sorely aggravated,” *Bannercraft, supra*, by the refusal of LOGSA to share the names of those with certifications.⁹ Moreover, while one could argue that a contractor could foresee one or two incumbent employees refusing work for a new contractor, it is an abnormal circumstance where the three lab chiefs engaged in a conspiracy to prevent performance, and engineered a situation where virtually all employees in all three locations refused to work for NTC.

⁹ We do not decide if the reason for refusal (Privacy Act) was a valid one; we only decide that such refusal exacerbated the inability of NTC to hire qualified people.

While the successful conspiracy to thwart performance by NTC was not technically a strike, it was tantamount to a strike. A strike has been defined as “a work stoppage by a body of workers to enforce compliance with demands made on an employer,” *Webster’s Ninth New Collegiate Dictionary* 1167 (1983); and as a “combined effort among workers to compel their employer to the concession of a certain demand, by preventing the conduct of his business until compliance with the demand.” *Black’s Law Dictionary* 1423 (6th ed., 1990). The missing element in this scenario is that the incumbents were not technically ever employed by NTC. When NTC acceded to the onerous demands of the lab chiefs, they thought they had agreed to hire the incumbents and intended to do so. The refusal of the incumbents to work for NTC is akin to an excusable strike situation. However, the failure to meet the classic definition of strike is not fatal to NTC’s case because the termination for cause clause does not limit excusable causes to strikes.

Under these particular and peculiar circumstances, we find that the failures to perform were beyond the reasonable control and without the fault or negligence of NTC and are, therefore, excusable. Each termination for cause is hereby converted to a termination for convenience. The appeals are sustained.

Dated: 10 August 2004

RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 53720, 53721, 53722, Appeals of The NTC Group, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals